

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MIGUEL RIVERA,)
Petitioner)
)
v.) No. 06-CV-30095-MAP
) No. 00-CR-30035-MAP
UNITED STATES OF AMERICA,)
Respondent)

MEMORANDUM AND ORDER REGARDING
PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT
SENTENCE PURSUANT TO 28 U.S.C. § 2255
(Docket No. 1)

March 8, 2007

PONSOR, D.J.

Petitioner has filed a petition pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside or correct his sentence. His sole argument in support of the petition is that his criminal attorney failed to file a notice of appeal, despite Petitioner's request that he do so.

The government's response to the motion notes the absence of any colorable grounds for appeal, as well as Petitioner's failure to comply with the applicable one-year statute of limitations.

Both Petitioner's argument and the government's response are puzzling. The docket indicates that the court imposed sentence on Petitioner on October 12, 2001, and that judgment entered on October 16, 2001, committing Petitioner to the Bureau of Prisons for a sentence of 250 months. In

fact, the docket indicates that on October 22, 2001 a notice of appeal was filed on behalf of Petitioner. (See 00-CR-30035-MAP, Dkt. No. 41.) On October 29, 2001, the United States Court of Appeals assigned the appellate case number of 01-2506. On February 6, 2002, the Supplemental Record on Appeal was transmitted. On October 10, 2002, the Court of Appeals issued its Mandate affirming the court's judgment. (See Id., Dkt. No. 43.) On December 16, 2002, the Judgment of the Court of Appeals entered, indicating issuance of the judgment on September 18, 2002. This judgment allows the government's Motion for Summary Dismissal and indicates that "the district judge properly assumed for purposes of sentencing that he would have the power to depart if he deemed it appropriate. In the exercise of his discretion, he found no departure warranted." United States v. Rivera, No. 01-2506, slip op. at 1 (1st Cir. Sept. 18, 2002).

In short, contrary to Petitioner's argument, and contrary to what appears to be the government's assumption, a timely Notice of Appeal was filed in this case; the First Circuit considered the appeal and affirmed this court. The Motion to Vacate was not filed until three and one-half years after the First Circuit's affirmance. Under these circumstances, Petitioner's Motion to Vacate, Set Aside or

Correct Sentence (Dkt. No. 1) is hereby DENIED, and the petition is ordered dismissed. This case may now be closed.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge